Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

THOMAS A. DOLAN,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES L. HARRIS
Counsel of Record
LAW OFFICE OF JAMES L. HARRIS
2400 CRESTMOOR ROAD
NASHVILLE, TN 37215
615-386-7143

Attorney for Petitioner
Thomas A. Dolan

April 24, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Did not the United States Courts of Appeals for the Sixth Circuit err in holding that Mr. Dolan's claims are barred by the applicable statute of limitations by virtue of ineffective service of process?

RULE 14.1[b] STATEMENT

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner:
Thomas A. Dolan

Defendant-Appellees and Respondents:
United States of America
Guy Blackwell
Randall Kizer

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE COURTS

The Opinion of the United States Court of Appeals for the Sixth Circuit dated January 28, 2008 (an Opinion by Circuit Judges Rogers and Sutton and District Judge Bertelsman, sitting by designation) was recommended for full-text publication and is reported at 514 F.3d 587 (6th Cir. 2008).

The Order granting the defendant/respondents' motion to dismiss or in the alternative for summary judgment in the United States District Court for the Eastern District of Tennessee, docket number 3:06-cv-00208 was dated March 13, 2007. It is unreported. That decision is to be found at 2007 WL 784351 (E.D. Tenn. 2007) and at 2007 U.S. Dist. LEXIS 18893 (E.D. Tenn. 2007).

CONCISE STATEMENT OF THE BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

This is a direct appeal from a result obtained in a United States Court of Appeals. The Sixth's Circuit's Opinion is dated January 28, 2008. Consequently, the United States Supreme Court has jurisdiction by virtue of 28 USC § 1254.

STATUTES AND REGULATIONS INVOLVED IN THE CASE, *verbatim*

Rule 3, Tennessee Rules of Civil Procedure: COMMENCEMENT OF ACTION.

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days of issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year of the filing of the complaint.

Rule 4.04[10], Tennessee Rules of Civil Procedure: PROCESS.

Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the

summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03[2]. Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

CONCISE STATEMENT OF THE CASE

On May 26, 2005, Mr. Dolan filed suit in the United States District Court for the Middle District of Tennessee, well within the one-year statute of limitations, which would have expired on May 28, 2005. As to the United States of America and defendants Kizer and Blackwell, his suit was predicated on 42 USC § 1983. On February 13, 2006, the Middle District dismissed the case without prejudice on venue grounds. On June 2, 2006, Mr. Dolan re-filed his lawsuit in the United States District Court for the Eastern District of Tennessee. On June 7, 2006, summonses were issued as to Kizer, Blackwell, and the United States of America. There is no question of the efficacy of service on the United States. Both Blackwell (an Assistant United States

Attorney) and Kizer (a Special Agent of the FBI) were served by Certified Mail, Return Receipt Requested at the USDOJ office address in Knoxville, Tennessee. The returns of service were signed for by an employee of the United States Attorney's Office who is not a party to these proceedings. THERE IS NO QUESTION BUT THAT BOTH KIZER AND BLACKWELL RECEIVED THE SUMMONSES AND COMPLAINTS, AND NO QUESTION BUT THAT BOTH HAD ACTUAL NOTICE OF THE PROCEEDINGS AND THE COMPLAINT. IN THIS CASE THERE IS NO ASSERTION OR ISSUE OF PREJUDICE. These things occurred on June 27, 2006. On August 21, 2006 the scope of employment of both Kizer and Blackwell was certified by the Department of Justice, and on that same day The United States, Kizer, and Blackwell for motions to dismiss or in the alternative for summary judgment. By Order dated March 13, 2007, the United States District Court for the Eastern District of Tennessee granted the motions to dismiss, holding, *inter alia,* that Kizer and Blackwell had not been correctly served. Mr. Dolan appealed, and by written opinion decided and filed January 28, 2008, the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR GRANTING THE PETITION AND ARGUMENT

Rule 10[a] of the Rules of the United States Supreme Court speaks to cases where a United States Court of Appeals "...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...". That is precisely what has happened here.

Mr. Dolan finds his claims dismissed on statute of limitations grounds because the summonses that were served on Mr. Kizer and Mr. Blackwell were not served on them at their respective home addresses. Inexplicably, the Sixth Circuit reached this result by relying on an unreported District Court case, *v. Hess,* 2006 WL 2370205, 2006 U.S. Dist. LEXIS 57963 (E.D. Tenn. 2006). A review of that case reveals the counterintuitive holding that "...actual knowledge and lack of prejudice cannot take the place of legally sufficient service." The citation for that proposition is *LSJ Inv. Co. v. O.L.D., Inc.,* 167 F.3d 320 (6th Cir. 1999). Even the most cursory review of *LSJ* reveals that it is readily distinguishable from the case at bar on its facts. In *LSJ,* the principal issue involved a defendant who, both the District Court and the Sixth Circuit observed, may well have been actively evading service; here, the issue which was deemed dispositive in the courts below is wholly unrelated to any such thing. Moreover, the *LSJ* panel correctly observed (at 167 F.3d 323) that service of process must comport with due process by providing notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to "...present their objections." THAT IS PRECISELY WHAT HAPPENED HERE.

The situation that is the subject of this Petition is further complicated by U.S. District Judge Phillips' express – indeed virtually exclusive - reliance on *Ecclesiastical Order of the Ism of Am v. Chasin,* 845 F.2d 113 (6th Cir. 1988). That case is, if anything, less apposite than the cases cited hereinabove. In *Chasin,* the was no effort to serve the individual defendants;

process was had only on the Department of Justice. Here, as noted, the is no dispute that Kizer and Blackwell were actually served.

CONCLUSION

As articulated, the results obtained in both the District Court and the Sixth Circuit were predicated on inapposite case law. No case relied upon by either the trial court or the appellate tribunal stands for any proposition that could result in dismissal of Mr. Dolan's claims on limitation grounds. This is a circumstance that can fairly be said to define a far departure from the accepted and usual course of judicial proceedings. Thomas A. Dolan earnestly petitions this court for the issuance of the writ of *certiorari*. By no other method can the harsh and unlawful result below be rectified.

Respectfully submitted,

James L. Harris (TN BPR # 014173)
2400 Crestmoor Road
Nashville, TN 37215
615-386-7143

Attorney for Petitioner
Thomas A. Dolan

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-5369

[Filed: January 28, 2008]

THOMAS A. DOLAN, *Plaintiff-Appellant*,	)
v.	)
UNITED STATES OF AMERICA, et al., *Defendants-Appellees*.	)

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 06-00208—Thomas W. Phillips, District Judge

Before: ROGERS and SUTTON, Circuit Judges; BERTELSMAN, District Judge.*

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

BERTELSMAN, District Judge. Plaintiff/Appellant, Thomas A. Dolan, appeals from the dismissal of tort claims against the United States and *Bivens* and common law conspiracy claims against individual defendants, Guy Blackwell, Randall Kizer, and Bruce Poston. The district court filed a memorandum opinion which may be found at 2007 WL 784351. After careful review, we **AFFIRM.**

The case involves several procedural and jurisdictional issues.

I. BACKGROUND

As stated by the district court, the factual and procedural background of the case is as follows:[1]

Plaintiff is an engineer who held a faculty position with the University of Tennessee Center for Industrial Services. During the course of his employment there, Plaintiff began working with Frank Prasil, an inventor who had developed a process for the recycling of ink. With Plaintiff's assistance, Prasil applied for and received a $390,000 research and development grant from the U.S. Department of Energy.

As one of the requirements for the grant, Prasil needed to obtain matching funds from an independent source. He approached the East Tennessee Banking

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[1] Appellant substantially accepts this statement by the district court.

Corporation (ETB) and received a commitment for the necessary funding. Prasil and Plaintiff informed the Tennessee Department of Environment and Conservation, which was partnered with the Department of Energy in the grant program, of ETB's funding commitment. A short time later, however, ETB notified Plaintiff that it was withdrawing its financial support.

Apparently, Prasil was able to obtain the needed funding from another source. In the meantime, ETB allegedly formed Environmental Ink, Inc., a company devoted to the development of processes that are similar to those invented by Prasil. When Prasil and Plaintiff learned of Environmental Ink, they attempted to force the company to cease and desist from exploiting Prasil's research.

Bruce Poston, the President of both ETB and Environmental Ink, sent a twenty-four page letter to the Department of Energy asking for a formal investigation into the grant given to Prasil. The letter outlined alleged irregularities in the grant application and questioned the use of grant funds. Poston supposedly implicated Plaintiff as the author of the most misleading information in the grant application. Copies of the letter were sent to Plaintiff's employer and to the Tennessee Department of Environment and Conservation. Plaintiff left his position at the University of Tennessee and Prasil's grant was withdrawn.

The U.S. Department of Justice conducted an investigation to determine whether there was any truth in Poston's allegations. In August 2001, Plaintiff

and Prasil were charged with making false statements to the Department of Energy and mail fraud. *United States v. Thomas A. Dolan,* No. 3:01-CR-115 (E.D. Tenn.) (J. Varlan). The case was delayed until 2004, due to health problems of Plaintiff's co-defendant, Prasil. In early May 2004, the United States began preparation for trial. It was discovered that the evidence establishing the mailing and venue for the false statements could not be found by state officials. Without the evidence, the United States was unable to prove the allegations in the indictment beyond a reasonable doubt, and the charges against Plaintiff were dropped.

On May 26, 2005, Plaintiff, through counsel, initiated an action pursuant to 42 U.S.C. § 1983 in the United States District Court [for the Middle District of Tennessee] against the United States of America; Guy Blackwell, the federal prosecutor who brought the charges against the petitioner; Randall Kizer, a special investigator for the U.S. Department of Justice; and Bruce Poston, the President of ETB and Environmental Ink. The complaint alleged seven claims for relief:

1. Blackwell suppressed exculpatory evidence in violation of the plaintiff's right to due process;

2. Blackwell denied the plaintiff due process when he knowingly fabricated evidence;

3. Kizer denied the plaintiff due process when he knowingly fabricated evidence;

4. Blackwell, Kizer and Poston "formed an agreement to fabricate evidence" against the plaintiff in an effort to deny him due process;

5. Kizer violated the plaintiff's Fourth Amendment right to be free from unlawful seizure when he maliciously fabricated evidence which was used as a basis for establishing probable cause to bring criminal charges;

6. Blackwell violated the plaintiff's Fourth Amendment right to be free from unlawful seizure when he maliciously fabricated evidence which was used for establishing probable cause to bring criminal charges; and

7. The defendants knowingly conspired to violate the plaintiff's Sixth Amendment right to a fair trial by suppressing favorable and requested evidence from the plaintiff.

Defendants filed a motion to dismiss the action in the Middle District. Judge Trauger granted the motion on February 13, 2006, finding that because the alleged misconduct occurred in the Eastern District of Tennessee, the Middle District was not the proper venue for resolution of Plaintiff's claims.

The present civil suit was filed by Plaintiff on June 2, 2006, and it replicates the previous civil suit filed against the defendants in the Middle District.

The defendants, United States of America, Guy Blackwell, and Randall Kizer, moved pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure for an order dismissing Plaintiff's claims against the United States and the claims against Blackwell and Kizer or, in the alternative, for summary judgment in defendants' favor on the basis of (1) lack of subject matter jurisdiction, (2) failure to state a claim upon which relief can be granted, (3) failure to meet traditional pleading standards, (4) statute of limitations, (5) failure to personally serve the individual defendants, (6) absolute immunity, (7) qualified immunity, and (8) substitution of the United States for any common law claims.

A time line will be of assistance in understanding the issues.

August 7, 2001:	Plaintiff was indicted in the Eastern District of Tennessee.
May 28, 2004:	Indictment voluntarily dismissed by United States.
May 26, 2005:	Suit filed in Middle District of Tennessee
February 13, 2006:	Suit dismissed without prejudice in Middle District for improper venue.
June 2, 2006:	This action filed in Eastern District of Tennessee.

June 7, 2006: Summons issued against United States, Blackwell and Kizer to be served by certified mail at "United States Department of Justice 800 Market Street, Suite 211, Knoxville Tenn." The Attorney General was also served with the summons on the United States.

June 27, 2006: Individual defendants purportedly served by certified mail at above address. Certified mail receipts signed by an employee in the United States Attorney's Office, but were not signed by the individual defendants.

August 21, 2006: Scope of employment certifications filed.

August 21, 2006: Motions to dismiss or in the alternative for summary judgment filed by United States on behalf of itself and Blackwell and Kizer.

September 8, 2006: Response and affidavit of Plaintiff filed.

March 13, 2007: Motion to dismiss United States and individual federal

	defendants granted and judgment entered.
April 13, 2007:	Defendant Poston also dismissed.

This timely appeal followed.

The district court dismissed the claims against the United States for lack of jurisdiction, because Plaintiff had not complied with the Federal Tort Claims Act. 28 U.S.C. § 2675(a). It dismissed the 42 U.S.C. § 1983 claims because such claims must be based on state action. It dismissed the 42 U.S.C. § 1985 claim on the basis of sovereign immunity and because Plaintiff made no allegation that the alleged conspiracy was motivated by a "class-based animus." It dismissed the common law claims against the individual federal defendants because of the certifications that these defendants were acting in the course of their employment with regard to all allegations of the complaint. Under the Westfall Act, the United States was substituted as a defendant instead of these individuals. Finally, it dismissed the *Bivens* claims against the individual federal defendants because the statute of limitations had run. Plaintiff challenges only the final two rulings in his brief herein, and only they need to be discussed.

II. ANALYSIS

A. The Westfall Certification

The district court's discussion on this issue was succinct and to the point:

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (the "Westfall Act"), the United States is to be substituted in a civil action for money damages brought against a federal employee who is alleged to have committed a common law tort while acting within the scope of his employment. See 28 U.S.C. § 2679(b)(1); *Osborn v. Haley*, 127 S. Ct. 881, 887-88 (2007); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1142 (6th Cir. 2000). The Westfall Act provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1); *RMI Titanium*, 78 F.3d at 1143 (6th Cir. 2000). The Attorney General has delegated to the United States Attorney the authority to provide such certification. 28 C.F.R. § 15.4; *Id.* Upon the United States Attorney's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the FTCA. *Osborn*, 127 S. Ct. at 888.

> The United States Attorney for the Eastern District of Tennessee, pursuant to 28 U.S.C. § 2679(d)(1) and 28 C.F.R. 15.4, has certified that Blackwell and Kizer were both acting within the scope of their offices and employment at the time of the incidents complained of by plaintiff. Therefore, pursuant to the provisions of 28 U.S.C. § 2679(d)(1), all state common law claims alleged in plaintiff's complaint are deemed claims against the United States, and the United States is substituted as the sole party defendant respecting such common law tort claims. Accordingly, all state common law claims against defendants Blackwell and Kizer will be dismissed.
>
> The federal two-year statute of limitations, discussed above, bars any cognizable tort claims under the FTCA, and sovereign immunity bars any claims non-cognizable under the FTCA. Accordingly, any state common law claims against the United States will be dismissed for lack of subject matter jurisdiction.

Dolan v. United States, No. 3:06-CV-208, 2007 WL 784351, at *5-*6 (E.D. Tenn. Mar.13, 2007).

Plaintiff argues that the summary judgment standard should apply to our review of this issue and that the affidavit filed by him, alleging (albeit in a conclusory fashion) that the individual federal defendants had fabricated evidence, created "genuine issues of material fact." *See* Fed. R. Civ. P. 56.

As pointed out in the government's brief, however, although the accuracy of the certification is reviewable by the district court in which it is filed, the summary judgment standard is not the one to be utilized. Rather,

> Under the Westfall Act, the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). The Supreme Court has held, though, that the Attorney General's scope-of-employment certification is subject to judicial review for purposes of substitution. *See Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995); *see also Arbour v. Jenkins,* 903 F.2d 416, 421 (6th Cir. 1990). We have stated that "[w]hether an employee was acting within the scope of his employment is a question of law, not fact, made in accordance with the law of the state where the conduct occurred." *RMI Titanium Co. v. Westinghouse Electric Corp.,* 78 F.3d 1125, 1143 (6th Cir. 1996). However, "when a district court is reviewing a certification question under the Westfall Act, it must identify and resolve disputed issues of fact necessary to its decision before entering the order." *Arthur v. United States,* 45 F.3d 292, 296 (9th Cir. 1995); *see also Heuton v. Anderson,* 75 F.3d 357, 361 (8th Cir. 1996); *Melo v. Hafer,* 13 F.3d 736, 747 (3rd Cir. 1994); *Kimbro v. Velten,* 30 F.3d 1501, 1509 (D.C. Cir. 1994), *cert. denied,* 515 U.S. 1145, 115 S. Ct. 2584, 132 L. Ed. 2d 833 (1995). We review de novo both the district court's conclusions of

> law, *Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996), and the district court's application of the law to the facts, *RMI*, 78 F.3d at 1135.

Singleton v. United States, 277 F.3d 864, 870 (6th Cir. 2002) (footnotes omitted).

Further, if the certification is well taken, that is, if the defendant federal employee was acting in the scope of his or her employment, substitution of the United States as defendant is appropriate and the district court "must assess the plaintiff's claims pursuant to the Federal Tort Claims Act (FTCA)." *Id.* at n. 5. That is, if the administrative requirements of the FTCA have not been fulfilled, the case must be dismissed for lack of jurisdiction. *Rector v. United States*, 243 Fed. Appx. 976, 979 (6th Cir. 2007); *Singleton*, 277 F.3d at 872; *Blakely v. United States*, 276 F.3d 853, 865 (6th Cir. 2002).

The issue of whether the certification is correct, i.e., whether the federal employee was acting within the scope of his or her employment, is governed by the agency law of the forum state. *Singleton*, 277 F.3d at 870; *Rector*, 243 Fed. Appx. at 978-79. The district court must resolve any issues of fact and may hold an evidentiary hearing, if necessary. *Singleton*, 277 F.3d at 870-71. However, the certification "provides *prima facie* evidence that the employee was acting within the scope of employment." *Id.* The burden is on the plaintiff to "produce evidence that demonstrates that the employee was not acting in the scope of employment." *Id.* at 871. Although the district court may hold an evidentiary hearing, no hearing is needed

"where even if the plaintiff's assertions were true, the complaint allegations establish that the employee was acting within the scope of his/her employment." *Id.*

In *Roberts v. United States,* 191 Fed. Appx. 338 (6th Cir.), *cert. denied,* 127 S. Ct. 683 (2006), we had occasion to apply the agency law of Tennessee to a similar Westfall Act situation. There, the plaintiff alleged that co-worker federal employees had engaged in a conspiracy against him to cause him to be fired from a Veterans' Hospital. Personal bias and malice were alleged.

We held that Restatement (Second) of Agency § 228 provided the applicable tests for scope of employment:

> Under Tennessee law, an employee acts within the scope of his employment if the employee's conduct meets the test set forth in the Restatement (Second) of Agency § 228 (1957):
>
> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and

> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

Roberts, 191 Fed. Appx. at 342 (citing *Tenn. Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.,* 840 S.W.2d 933, 938 (Tenn. Ct. App. 1992)).

Applying these criteria, we held that the Westfall certification was valid. We observed that "Tennessee law generally measures the scope of employment not by 'the motive of the servant, but whether that which he did was something his employment contemplated, and something which if he should do it lawfully he might do in his employer's name.'" *Id.* at 343 (quoting *Hall Grocery Co. v. Wall,* 13 Tenn. App. 203, 208 (1930)). Our subsequent discussion controls the case now before us:

> Under Tennessee law, an employee can act within the scope of his employment even when committing wanton or willful torts against another[.]
>
> The rule recognized in all the recent cases ... is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the

> master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them.

Id. at 343.

Here, the individual federal defendants were employed by the federal government to investigate and prosecute cases. As the above discussion shows, even if they acted improperly or maliciously in investigating or prosecuting Plaintiff, as Plaintiff alleges, they were still within the scope of their employment. This would be the case, even if Plaintiff's factual showing were true. Therefore, the Westfall Act certification was proper and the district court properly dismissed the common law claims against individual federal defendants as being governed by the Federal Tort Claims Act.

B. The Statute of Limitations has Expired on the *Bivens* Claims[2]

As the time line, *supra,* shows, Plaintiff's first suit in the Middle District of Tennessee was dismissed other than on the merits on February 13, 2006. Under Tennessee's savings statute, Plaintiff had one year to "commence a new action." Tenn. Code. Ann. § 28-1-105(a).[3]

Under Tennessee Rule of Civil Procedure 3, timely service of process is essential to the commencement of an action such that the statute of limitations is satisfied.

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[2] A *Bivens* claim, named after a landmark 1971 Supreme Court decision that established it, is a claim for money for injuries sustained as a result of a federal agent's violation of the constitution while acting under his federal authority. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 397 (1971); *Salt Lick Bancorp v. F.D.I.C.*, 187 Fed. Appx. 428, 440 (6th Cir. 2006).

[3] The parties agree that the Tennessee Rules of Civil Procedure apply. Appellant does not cite Federal Rule of Civil Procedure 3 or 4, but the defendants point out that Federal Rules 4(i)(2)(B) and 4(c) require compliance with state law, if a federal employee sued individually is not served personally or by leaving the process with a responsible individual at the defendant's dwelling, house or usual place of abode. Nor does the Appellant refer in any way to Federal Rule of Civil Procedure 4(m) and he has, therefore, waived any argument that might have been made under that sub-rule. *See Hargrave v. McKee,* No. 05-1536, 2007 WL 2818339, *9 (6th Cir. Sept. 27, 2007) (quoting *United States v. Ford,* 184 F.3d 566, 578 n.3 (6th Cir. 1999)); *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 852-53 (6th Cir. 2007).

> **Rule 3. Commencement of Action**
> All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days *or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations* unless the plaintiff continues the action by obtaining issuance of new process *within one year from issuance of the previous process* or, if no process is issued, within one year of the filing of the complaint.

Tenn. R. Civ. P. 3. (emphasis added).

Thus, it was necessary under Tennessee law for Plaintiff to accomplish valid service of process in this action within 90 days of February 13, 2006 to satisfy the statute, since no further process was issued at any time up to the dismissal of the case.

Plaintiff agrees with these propositions but relies on the purported service of process by certified mail on the individual federal defendants on June 7, 2006. We agree with the defendants, however, that such purported service was invalid. Neither of the individual defendants worked at the office to which the

certified mail was sent.[4] Tennessee Rule of Civil Procedure 4.04(10) authorizes service on a defendant by certified mail, if plaintiff or his agent sends "postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant." Tenn. R. Civ. P. 4.04(10). Here, although the certified mail was addressed by name to the defendants, it was sent to an office where they did not even work, and the receipt was signed by a person whose authority is not shown in the record. Therefore, the service was invalid. *Massey v. Hess,* No. 1:05-CV-249, 2006 WL 2370205, at *2 (E.D. Tenn. Aug. 14, 2006) (extensive discussion).

Therefore, there has never been any personal service on the individual federal defendants and, pursuant to Tennessee Rule of Civil Procedure 3, *supra,* since process was "not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of the statute of limitations unless the plaintiff continue[d] the action by obtaining issuance of new process within one year from issuance of the previous process." This was not done and the statute of limitations ran.

Therefore, the judgment of the District Court is **AFFIRMED.**

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[4] Plaintiff does not rebut the defendants' statement that neither defendant worked at the office to which the summons were sent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:06-CV-208 (Phillips)

[Filed March 13, 2007]

THOMAS A. DOLAN, *Plaintiff*,	)
v.	)
UNITED STATES OF AMERICA, GUY BLACKWELL, RANDALL KIZER, and BRUCE POSTON, *Defendants*.	)

MEMORANDUM OPINION

Plaintiff Thomas A. Dolan has filed tort claims against the United States, and *Bivens* claims and conspiracy claims against defendants Blackwell and Kizer arising out of a criminal case brought in the Eastern District of Tennessee in which Dolan was indicted but was later dismissed. The defendants have moved to dismiss all claims brought by plaintiff, or in the alternative, for summary judgment. For the reasons stated below, defendants' motion to dismiss

will be granted and the United States of America, Guy Blackwell and Randall Kizer will be **DISMISSED** as defendants.

Background

The plaintiff is an engineer who held a faculty position with the University of Tennessee Center for Industrial Services. During the course of his employment there, the plaintiff began working with Frank Prasil, an inventor who had developed a process for the recycling of ink. With the plaintiff's assistance, Prasil applied for and received a $390,000 research and development grant from the U.S. Department of Energy.

As one of the requirements for the grant, Prasil needed to obtain matching funds from an independent source. He approached the East Tennessee Banking Corporation (ETB) and received a commitment for the necessary funding. Prasil and the plaintiff informed the Tennessee Department of Environment and Conservation, which was partnered with the Department of Energy in the grant program, of ETB's funding commitment. A short time later, however, ETB notified the plaintiff that it was withdrawing its financial support.

Apparently, Prasil was able to obtain the needed funding from another source. In the meantime, ETB allegedly formed Environmental Ink, Inc., a company devoted to the development of processes that were very similar to those invented by Prasil. When Prasil and the plaintiff learned of Environmental Ink, they

attempted to force the company to cease and desist from exploiting Prasil's research.

Bruce Poston, the President of both ETB and Environmental Ink, sent a twenty-four page letter to the Department of Energy asking for a formal investigation into the grant given to Prasil. The letter outlined alleged irregularities in the grant application and questioned the use of grant funds. Poston supposedly implicated the plaintiff as the author of the most misleading information in the grant application. Copies of the letter were sent to the plaintiff's employer and to the Tennessee Department of Environment and Conservation. The plaintiff left his position at the University of Tennessee and Prasil's grant was withdrawn.

The U.S. Department of Justice conducted an investigation to determine whether there was any truth in Poston's allegations. In August 2001, the plaintiff and Prasil were charged with making false statements to the Department of Energy and mail fraud. *United States of America v. Thomas A. Dolan,* No. 3:01-CR-115 (E.D. Tenn) (J. Varlan). The case was delayed until 2004, due to health problems of plaintiff's co-defendant, Prasil. In early May 2004, the United States began preparation for trial. It was discovered that the evidence establishing the mailing and venue for the false statements could not be found by state officials. Without the evidence, the United States was unable to prove the allegations in the indictment beyond a reasonable doubt, and the charges against the plaintiff were dropped.

On May 26, 2005, the plaintiff, through counsel, initiated an action pursuant to 42 U.S.C. § 1983 in the United District Court, Middle Division, against the United States of America; Guy Blackwell, the federal prosecutor who brought the charges against the petitioner; Randall Kizer, a special investigator for the U.S. Department of Justice; and Bruce Poston, the President of ETB and Environmental Ink. The complaint alleged seven claims for relief:

1. Blackwell suppressed exculpatory evidence in violation of the plaintiff's right to due process;

2. Blackwell denied the plaintiff due process when he knowingly fabricated evidence;

3. Kizer denied the plaintiff due process when he knowingly fabricated evidence;

4. Blackwell, Kizer and Poston "formed an agreement to fabricate evidence" against the plaintiff in an effort to deny him due process;

5. Kizer violated the plaintiff's Fourth Amendment right to be free from unlawful seizure when he maliciously fabricated evidence which was used as a basis for establishing probable cause to bring criminal charges;

6. Blackwell violated the plaintiff's Fourth Amendment right to be free from unlawful seizure when he maliciously fabricated evidence which was used for establishing

probable cause to bring criminal charges; and

7. The defendants knowingly conspired to violate the plaintiff's Sixth Amendment right to a fair trial by suppressing favorable and requested evidence from the plaintiff.

Defendants filed a motion to dismiss the action in the Middle District. Judge Trauger granted the motion on February 13, 2006, finding that because the alleged misconduct occurred in the Eastern District of Tennessee, the Middle District was not the proper venue for resolution of plaintiff's claims.

The present civil suit was filed by plaintiff on June 2, 2006, and replicates the previous civil suit filed against the defendants in the Middle District.

The defendants, United States of America, Guy Blackwell, and Randall Kizer, move pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure for an order dismissing plaintiff's claims against the United States and the claims against Blackwell and Kizer, or in the alternative, for summary judgment in defendants' favor on the basis of (1) lack of subject matter jurisdiction, (2) failure to state a claim upon which relief can be granted, (3) failure to meet traditional pleading standards, (4) statute of limitations, (5) failure to personally serve the individual defendants, (6) absolute immunity, (7) qualified immunity, and (8) substitution of the United States for any common law claims.

Analysis

A "district court may, at any time, *sua sponte* dismiss a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit or no longer open to discussion." *Apple v. Glenn,* 183 F.3d 477, 479 (6th Cir. 1999). Federal courts are always "under an independent obligation to examine their own jurisdiction," *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), and a federal court may not entertain an action over which it has no jurisdiction. *See Insurance Corp. Of Ireland, Ltd v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701 (1982). If a court lacks jurisdiction, it "cannot proceed at all in any cause; jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998).

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) requires the court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.) *cert. denied,* 498 U.S. 867 (1990). The court may not grant such a motion to dismiss based

upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall,* 898 F.2d 1196, 1198 (6th Cir. 1990); *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir. 1995) (noting that courts should not weigh evidence or evaluate the credibility of witnesses). The court must liberally construe the complaint in favor of the party opposing the motion. *Id.* However, the complaint must articulate more than a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434 (6th Cir. 1988). "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

In the alternative, defendants have moved for summary judgment pursuant to Rule 56(c), Federal Rules of Civil Procedure. Rule 56(c) provides that summary judgment will be granted by the court only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show that no genuine issue of material fact exists. The court must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Morris to Crete Carrier Corp.,* 105 F.3d 279, 280-81 (6th Cir. 1987); *White v. Turfway Park Racing Ass'n, Inc.,* 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987). Once the moving party presents evidence sufficient to support a motion under Rule 56, Federal Rules of Civil Procedure, the non-moving party is not entitled to a trial simply on the basis of allegations. The

non-moving party is required to come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *White,* 909 F.2d at 943-44. The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex,* 477 U.S. at 323; *Collyer v. Darling,* 98 F.3d 220 (6th Cir. 1996).

Claims against the United States

The plaintiff's claims against the United States are premised upon the doctrine of *respondeat superior.* However, as noted in Judge Trauger's memorandum,

> [T]he plaintiff cannot sue a defendant for constitutional violations solely because of its status as a supervisor or employer. 42 U.S.C. § 1983 will not support a claim posed on a *respondeat superior* theory of liability. *Polk County v. Dodson,* 454 U.S. 312, 325 (1981). Where there is no allegation of participation, either directly or indirectly, by an employer in an allegedly wrongful act, the complaint fails to state a cause of action upon which relief can be granted. *See Dunn v. Tennessee,* 697 F.2d 121, 128 (6th Cir. 1982).
>
> In this case, there are no allegations whatsoever suggesting that the United States or any of its agencies participated in the knowing and malicious fabrication of evidence, suppression of exculpatory evidence or conspiracy that is

> alleged against the individual defendants. Moreover, the remaining defendants are being sued in their individual rather than official capacities. Therefore, the complaint fails to state a claim against the United States upon which relief can be granted.

Thomas A. Dolan v. United States of America, et al., Civil Action No. 3:05-0401 (M.D. Tenn. February 13, 2006). Plaintiff has filed the same exact allegations in the instant lawsuit. The court concurs with Judge Trauger's reasoning, and finds this portion of plaintiff's complaint fails to state a claim against the United States upon which relief can be granted. Accordingly, the plaintiff's claims against the United States based upon *respondeat superior* will be dismissed.

Next, plaintiff has brought no claims against the United States under the Federal Tort Claims Act (FTCA), and the applicable two-year statute of limitations would bar any such claims. The FTCA, 28 U.S.C. § 2675(a), requires that an administrative claim be presented to and finally denied by the appropriate federal agency before commencing suit in district court. A FTCA claim is governed by a two-year statute of limitations which is different from a *Bivens* case, which adopts the state's statute of limitations (in Tennessee, one year). The FTCA imposes its own statute of limitations, 28 U.S.C. § 2401(b), which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two

> years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Accordingly, an individual seeking to bring an action under the FTCA "must present a written claim to the federal agency concerned within two years of the date the cause of action accrues." Under the FTCA, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered the injury and its cause. *Landreth v. United States,* 850 F.2d 532, 533 (9th Cir. 1988).

Plaintiff's claims accrued, at the latest, on May 28, 2004, when he received notice that the criminal case against him was being dismissed. The record shows that no administrative claims have been filed by plaintiff, and over two years have passed since the dismissal of the charges against him. Therefore, any common law claims against the United States that could have been filed by plaintiff under the FTCA are time-barred, and will be dismissed for lack of subject matter jurisdiction.

Section 1983 Claims

Plaintiff alleges that he is entitled to relief pursuant to 42 U.S.C. § 1983. However, § 1983 cannot serve as the basis for a claim against federal officers or the United States. An essential element of a claim under § 1983 is that the "conduct complained of must be committed under color of state law." *Leon v. Fed. Reserve Bank Chicago,* 823 F.2d 928, 931 (6th Cir.

1987). A § 1983 action cannot be sustained if the actions were not taken under color of state law. Federal agencies and their agents act under color of federal, not state law, so the federal government and its officials are not subject to suit under § 1983. *Conner v. Greef,* 99 Fed. Appx. 577, 580 (6th Cir. 2004). Defendants Blackwell and Kizer are both federal, not state agents. In addition, the charges brought against plaintiff were based on federal law, not state law. Because defendants did not act under color of state law, plaintiff's complaint against Blackwell and Kizer under § 1983 will be dismissed for failure to state a claim upon which relief can be granted.

Section 1985 Claim

Plaintiff's complaint also alleges conspiracy claims under 42 U.S .C. § 1985. The Sixth Circuit has held that:

> To establish a claim under 42 U.S.C. § 1985(3), a plaintiff must prove (1) a conspiracy involving two or more persons (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. Plaintiff must also establish that the conspiracy was motivated by a class-based animus.

Johnson v. Hills & Dales General Hosp., 40 F.3d 837, 839 (6th Cir. 1994). There is no cause of action against the United States under § 1985(3) because there is no

waiver of sovereign immunity. In addition, plaintiff's complaint fails to make any allegation that "the conspiracy was motivated by a class-based animus" and therefore missing a vital component. Therefore, plaintiff's § 1985 claims against the United States and defendants Blackwell and Kizer will be dismissed for failure to state claims upon which relief can be granted.

Common Law Claims Against Blackwell and Kizer

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28, U.S.C. § 2679 (the "Westfall Act"), the United States is to be substituted in a civil action for money damages brought against a federal employee who is alleged to have committed a common law tort while acting within the scope of his employment. *See* 28 U.S.C. § 2679(b)(1); *Osborn v. Haley,* 127 S. Ct. 881, 887-88 (2007); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1142 (6th cir. 2000). The Westfall Act provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1); *RMI Titanium,* 78 F.3d at 1143 (6th cir. 2000). The Attorney General has delegated to the United States Attorney the authority to provide such certification. 28 C.F.R. § 15.4; *Id.* Upon the United States Attorney's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the FTCA. *Osborne,* 127 S. Ct. at 888.

The United States Attorney for the Eastern District of Tennessee, pursuant to 28 U.S.C. § 2679(d)(1) and 28 C.F.R. 15.4, has certified that Blackwell and Kizer were both acting within the scope of their offices and employment at the time of the incidents complained of by plaintiff. Therefore, pursuant to the provisions of 28 U.S.C. § 2679(d)(1), all state common law claims alleged in plaintiff's complaint are deemed claims against the United States, and the United States is substituted as the sole party defendant respecting such common law tort claims. Accordingly, all state common law claims against defendants Blackwell and Kizer will be dismissed.

The federal two-year statute of limitations, discussed above, bars any cognizable tort claims under the FTCA, and sovereign immunity bars any claims non-cognizable under the FTCA. Accordingly, any state common law claims against the United States will be dismissed for lack of subject matter jurisdiction.

Constitutional Tort Claims Against Blackwell and Kizer

Tennessee's one-year limitations period for personal injury actions governs plaintiff's constitutional tort claims against defendants Blackwell and Kizer. *See* Tenn. Code Ann. § 28-3-104(a); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). Plaintiff had one year from his notice of the dismissal of his criminal case on May 28, 2004 to file a civil suit. Plaintiff timely filed his original complaint in the Middle District on May 26, 2005, but that case was dismissed in the Middle District on February 2, 2006. For tolling of the statute of limitations to apply, plaintiff needed to have served the individual defendants with the summons and complaint. *See* Tenn.Code Ann. § 28-1-105(a).

Rule 4.04(1), Tennessee Rules of Civil Procedure, sets forth that service shall be made:

> Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of above with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

In the instant case, plaintiff attempted to serve defendants Blackwell and Kizer by certified mail addressed to the "U.S. Dept. of Justice, 800 Market Street, Suite 211, Knoxville, TN 37902." While service upon the Department of Justice may be effective for defendants in their official capacities, it is insufficient to establish personal jurisdiction over them in their individual capacities. *Ecclesiastical Order of the Ism of Am v. Chasin,* 845 F.2d 113, 116 (6th Cir. 1988). Personal service does not include service at a defendant's place of employment. F.R.C.P. 4(e); *Daly-Murphy v. Winston,* 837 F.2d 348, 355 (9th Cir. 1987). The fact that defendants may have had actual notice of the suit is immaterial. *See Ecclesiastical,* 845 F.2d at 116.

Plaintiff never properly served the individual defendants in the original suit in the Middle District. *See* Declarations of Blackwell and Kizer [Docs. 8-4, 8-5]. Nor has plaintiff effected service of process upon Blackwell and Kizer personally in the Eastern District. Because of the lack of personal service in either case, tolling does not apply, and the plaintiff's claims against Blackwell and Kizer, individually, are barred by the Tennessee one-year statute of limitations and will be dismissed.

Because the defendants' motion to dismiss is dispositive, the court need not reach an analysis of the merits of defendant's motion for summary judgment.

Conclusion

For the reasons set forth above, the defendants' motion to dismiss [Doc. 8] is **GRANTED** and the

United States of America, Guy Blackwell and Randall Kizer are hereby **DISMISSED** as defendants. Defendant Bruce Poston has not moved the court to dismiss the claims against him and he remains as a defendant in this action.

ENTER:

s/ Thomas W. Phillips
United States District Judge